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In The Supreme Court of the United States

OCTOBER TERM 1967

HILLTOP REALTY, INC., ET AL, *Petitioners*,

v.

SEATTLE FIRST NATIONAL BANK, AS EXECUTOR OF THE ESTATE OF LAURENCE P. SMITH, ET AL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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THE ARGUS PRESS SEATTLE, WASHINGTON

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Come now the petitioners, Hilltop Realty, Inc., an Ohio corporation, Mildred Winslow Ashcraft and Aileen D. Winslow Powell, and herewith pray that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the 9th Circuit entered in the above entitled case and filed with the Clerk of the Circuit Court of Appeals for the 9th Circuit on September 13, 1967 in Cause No. 21,207, in which a petition for rehearing was denied on November 29, 1967, and in support of said petition herewith state as follows:

A. Reference to Opinions Below

The citation of the case decided by the Circuit Court of Appeals for the 9th Circuit and filed with the Clerk of said Court of Appeals on September 13, 1967 is 383 F.2d 309, and the order denying the petition for rehearing was filed with the Clerk of said Circuit Court on November 29, 1967, and to the best of petitioners' knowledge has not been reported. Appended hereto and marked Appendix A a copy of the opinion of the Circuit Court of Appeals dated September 13, 1967; and appended as Appendix B is a copy of the unreported order denying the petition for rehearing.

B. Grounds Upon Which Jurisdiction Invoked

The opinion of the Court of Appeals was filed on September 13, 1967. A petition for rehearing was denied on November 29, 1967. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) and 28 U.S.C. 1331, 1332, 1333 as to the first three counts of the amended complaint and 15 U.S.C. Section 15 as to the fourth count.

C. Questions Presented for Review

1. Is a plaintiff in a federal antitrust action for treble damages entitled to a jury trial on the question of general damages without alleging any items of specific damages where the complaint alleges that the plaintiff's injury was the direct result of the defendants' conspiracy?

2. Should respondents be permitted to retain the consideration paid to them under a contract for serv-

ices which was entered into between the parties without the petitioners' knowledge of a flagrant conflict of interest which respondents fraudulently failed to disclose?

3. Should not the petitioners, Hilltop Realty, Inc. and the defrauded sisters, be entitled to recover punitive damages, including attorney's fees, as provided for under the governing statutes of the State of Ohio, from the respondents for the actual, malicious fraud perpetrated against them?

D. Statutory Provisions and Rules

15 U.S.C. §§ 1, 2

15 U.S.C. § 15

28 U.S.C. §§ 1291

§§ 1331, 1332, 1337

§ 2107

Baldwin's Ohio Revised Code, Ch. 1331 01, 08

Supreme Court Rules 19 (1) (b)

For copies thereof see Appendix C.

E. Statement of the Case

Respondents Larry Smith, et al. are partners in a real estate consulting firm which has one specialty — feasibility studies of potential shopping center sites (L. Smith, Tr. 2333-34).

Respondents Larry Smith, et al. had two divisions, the western division with headquarters in Seattle, and the eastern division with headquarters in Washington, D. C. (L. Smith Tr. 2333, R. 681).

The petitioner sisters, Mildred Winslow Ashcraft and Aileen D. Winslow Powell, were, prior to the commencement of this action, the owners of the Nutwood Farm site, one of several tracts of land in the metropolitan Cleveland area suitable for development as a shopping center.

The petitioner Hilltop Realty, Inc. was the duly authorized representative and agent of the petitioner sisters. Henry Petti was its president (Appendix A).

Larry Smith, et al. was a very large company with worldwide connections (L. Smith Tr. 2335, Kelly Tr. 2125, L. Smith Tr. 2332).

Under date of September 14, 1959, Henry Petti, president of Hilltop, wrote to Smith's New York office asking for a quotation of a fee to do a study of the Nutwood Farm site about 15 miles east of downtown Cleveland. The inquiry was referred to the Washington D. C. office of Smith and Company and by the head of that office referred to Mr. Ray T. Treiger, one of the account executives of the eastern division, who was familiar with the Cleveland marketing area through work on a property known as Longwood, or Severance, in Cleveland Heights, in which Smith, et al. had an interest (R. 1188, et seq.).

At this time neither petitioner Hilltop Realty, Inc. nor the petitioner sisters knew that the respondent had any current or proposed proprietary interest in

a competitive tract of land which was suitable for development as a shopping center (R. 1471, 1. 18-25). Nor did the respondents advise any of the petitioners of this conflict of interest (R. 1471, 1.24-26), but instead deliberately accepted a contract of employment and compensation therefor with knowledge of such conflict (See Appendix A, pp. 2, 3).

On September 30, 1959 Treiger wrote to Petti enclosing his written proposal to Petti for a contract with Larry Smith, et al. and suggesting a meeting in Cleveland. This was followed by a series of exchanges and meetings, all without any disclosure of the conflict of interest on the part of Smith (Ex. 33, Tr. 1190, 1191, 1195, 1197, 1202).

There are three major department stores in downtown Cleveland who were interested in locating in suburban shopping centers, to wit, The May Company, Halle Bros. Co. and The Higbee Company (R. 1153). The respondents conspired with Halle Bros., The Higbee Company and The Austin Company to prevent the development of any shopping center other than the location on which The May Company had already settled and the property in which the respondents were interested, to wit, the Severance Shopping Center. In the course of this conspiracy it is clear that the respondents and The Austin Company had several meetings, particularly one on June 11, 1957, and decided to preclude the development of any other shopping center which would be competitive with them, and in connection therewith agreed to "marry the competition," to wit, The Higbee Company and Halle Bros. Co., so that they would be located in the Severance Shopping Center, which was later purchased by the respondents, almost contemporaneously

with their agreement to advise the petitioners with reference to the development for the petitioners of a shopping center on the potentially competitive Nutwood property. This obviously was not only gross fraud of the most inexcusable type for a company as dominating in its field of the shopping center business as Larry Smith and Company, but was also clearly a conspiracy in restraint of trade (R. 568-9, 684, 685, 686, 687, 688).

Here, as is so seldom the case in antitrust actions, the evidence was in writing, not oral; the proof was not inferred from circumstantial parallelism, but was direct, stark and naked. Should such a brazen conspiracy go unpunished?

Petitioners were the victims of respondents' conspiracy and breach of contract in depriving them of an unbiased report from an expert without a disclosed conflict of interest (Appendix G, pp. 16, 17). Respondents' professional report was to the effect that Nutwood Farms was an excellent site for a regional shopping center except for the overwhelming amount of competition in the Nutwood Farms trade area, the greatest single element in which respondents ascribed to their own Severance Center (Ex. 29). Petitioners accepted respondents' negative conclusions and sold Nutwood for other than shopping center purposes (R. 1470).

As to the issue of fraud, see in particular the trial court judge's reference thereto, as "deliberate wanton concealment in complete disregard of the rights of the plaintiff . . ." Appendix F.

G. Jurisdiction in the Court of First Instance

The jurisdiction of the District Court, being the court of first instance, was invoked under 28 U.S.C. Sections 1331, 1332 and 1332, by virtue of diversity of citizenship and upon the ground that the matter in controversy exceeded, exclusive of interest and costs, the sum of $10,000. Furthermore, as to the antitrust claim, being count 4 of the first amended complaint, the jurisdiction of the court of first instance was invoked under 15 U.S.C. Section 15.

H. Reasons for the Allowance of the Writ

The petitioners respectfully submit that this court has ample reasons for granting the writ of certiorari pursuant to the provisions of subparagraph 1(b) of Rule 19 of the Supreme Court Rules as revised, upon the following grounds:

1. Under count 4 of the complaint, involving the alleged violations of sections 1 and 2 of the Sherman antitrust laws, the petitioners were unlawfully denied a right to a trial by jury.

This court has held, and so have many of the decisions of the circuit courts throughout the United States, including the 9th Circuit, that a petitioner claiming a violation of the antitrust laws, having once proved a causal relationship between the conspiracy and himself, has a right to a jury trial without the necessity of setting forth item by item any detailed allegations of damages.

In this connection, the case of *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 US 555, 51

S.Ct. 248, 75 L.ed. 544, is relevant. In this case, this court, in distinguishing and in effect overruling certain previous cases, held that "the wrongdoer is not entitled to complain that they (the damages) cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise" (citations). See Headnote 6. This is one of several Supreme Court cases supporting in substance the same rule as to damages in conspiracy cases where causal connection is alleged or proved.

The surprising thing about this case, insofar as conflict of authorities is concerned, is that except for the decision of the 9th Circuit in this action, its holdings are similar to those of other circuit courts throughout the land. See *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 471 (9th Cir. 1964), and *Hoopes v. Union Oil Co.*, 374 F.2d 480, decided February 3, 1967, which the 9th Circuit in this case failed to either mention or distinguish but both of which, in substance, uphold the rule above announced that the complainant in an antitrust action has the right to prove his case as to general damages where there is an allegation of conspiracy and causal relationship and where some general damages presumably have been suffered. In such cases damages are a question for the jury to decide.

In other words, this decision of the 9th Circuit is in effect a maverick on this point, being contrary to the overwhelming weight of authority both in the Supreme Court of the United States and other circuits as well as this circuit. Certainly, therefore, it should be clarified.

In this connection, see also *Fox West Coast Theatres Corp. v. T. Bldg. Corp.*, 264 F.2d 602, especially page 608, where the court stated:

> "There was substantial evidence of damage. Such damage need not be made patent item by item as on a balance sheet. The mere unlawful combination over a period of time to eliminate competition is proof of damage."

See also the case of *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 109, and especially that portion of the opinion covered by syllabis 7-8-9 dealing with the question of damages in which the court held that detailed proof of damages is not necessary, citing in support thereof the *Story Parchment Co. v. Paterson Parchment Paper Co.* case of the Supreme Court, cited *supra*. Certiorari in this case was denied, 361 U.S. 961, 4 L.Ed.2d 543, 80 S.Ct. 590.

A clear case of conspiracy was alleged between the respondents and Halle Bros. Co., Cleveland store, and The Austin Company. For example, at a meeting held June 11, 1957, these conspirators agreed to a program of precluding construction of competitive facilities in order to complete a shopping center in which the respondents were interested. This would place respondents in a dominant position and avoid the risk of a third marketing center which would have included a marketing center site owned by the petitioners. This conspiracy was so apparent that the respondents agreed to "marry the competition" and stated "we would like to control the meeting" (R. 568).

Despite the fact that the *Lessig* and *Hoopes* cases were directly in point in petitioners' favor, the Cir-

cuit Court opinion for the 9th Circuit fails either to distinguish or even to mention them or cases from this court or from other circuit courts supporting the position of petitioners.

2. In overruling the lower court on the question of damages, both actual and punitive, and attorney's fees under counts 1, 2 and 3, based upon the fraudulent acts of the respondents, the opinion of the 9th Circuit Court is clearly contrary to the almost universal rule of law that a party should not be permitted to unjustly enrich himself by the retention of profits received under a contract which was tainted with fraud from the beginning and which clearly led the petitioners to sell their property prior to any disclosure of the conflict of interest on the part of the respondents because of their interest in a competitive shopping center in the same relevant market.

This universal rule against unjust enrichment is well summarized in 58 CJS beginning at page 907, where it is stated:

> "It may [referring to an action for money had and received] in general be maintained, whenever one has money in his hands belonging to another, which, in equity and good conscience he ought to pay over to the other. Recovery in such cases is based on a promise implied by law or quasi contract and on the equitable principle that one who has been unjustly enriched at the expense of another is required to make restitution."

See, in particular, the many cases from the Supreme Court of the United States and countless other jurisdictions cited in footnotes 5, 6 and 7.

It is unbelievable that any court sitting in law or

in equity would permit any party to be so unjustly enriched, and it is particularly surprising in this case that the 9th Circuit permitted the respondents to so unjustly enrich themselves, especially in view of the fact that it conceded in its departmental opinion that "Smith may have been unethical in taking the Hilltop account while negotiating the purchase of a possible competitor." See page 6 of the court's opinion hereto attached as Appendix A.

Furthermore, the failure of the 9th Circuit Court to allow recovery for damages for the petitioners was in violation of the laws of the State of Ohio relating to fraud, it having been conceded by both sides that Ohio law governed.

We quote from the District Court's finding No. 8 as follows:

> Since the concealment of the conflict of interest made the Nutwood market analysis totally untrustworthy, Hilltop suffered financial injury as a proximate consequence: Hilltop Realty was damaged in the amount of $2,920 which it paid Smith for its market analysis (R. 1472, lines 1-6), and the Winslow sisters were damaged in a like amount of $2,920 because the fair market value to them of a reliable and trustworthy market analysis was at least equal to the price which Smith billed Hilltop Realty (R. 2028, line 30; 2029, line 16; cf. R. 1472, lines 16-17).

The Court accordingly concluded that:

> ". . . all eight elements of fraud under the Ohio law have been proven by clear, cogent and convincing evidence." (R. 1472, lines 12-14)

The actions of the respondents in their failure to

divulge the facts relating to their fraudulent concealment of their conflicting interests is so repugnant to all concepts of moral and legal behavior and also contrary to the overwhelming weight of authority on questions of fraud that this court should take jurisdiction in order that this question of the law of fraud should be clarified.

I. Opinion Below

There is appended hereto as Appendix A a copy of the opinion of the court below dated September 13, 1967. Also there are appended, as above noted, Appendix B, the order of the 9th Circuit denying petitioners' petition for rehearing, and Appendix C, covering the statutory provisions and rules. There are appended, in addition thereto, as Appendix D the tentative oral opinion of the trial court on August 6, 1965; Appendix E, the written memorandum decision of the trial court on October 27, 1965; Appendix F, the trial court's oral remarks on April 22, 1966; and Appendix G, the memorandum decision of the trial court, following the trial therein, on counts 1 and 2, this final memorandum decision being dated May 2, 1966.

J. Judgment of the Court Below

A copy of this has been appended as Appendix B.

Respectfully submitted,

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